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SUPREME COURT, U.S.

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In The

Supreme Court of the United States

GLADYS CHEHARDY, *et al.*,

Petitioners,

v.

ALLSTATE INDEMNITY CO., *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Should this Court review whether the Fifth Circuit erred, as a matter of Louisiana insurance law, in concluding that the inundation of New Orleans following Hurricane Katrina was a "flood" excluded from coverage by Petitioners' insurance policies?

2. Did the Fifth Circuit abuse its discretion in concluding that "the rules of contract interpretation set forth in the Louisiana Civilcy Code provide us with an adequate basis to decide this appeal," and therefore denying Petitioners' motion to certify the question presented to the Louisiana Supreme Court?

CORPORATE DISCLOSURE STATEMENT

Respondent Allstate Insurance Company is a wholly-owned subsidiary of The Allstate Corporation, which is a Delaware corporation. The stock of The Allstate Corporation is publicly-traded. No publicly-held entity owns 10% or more of the stock of The Allstate Corporation.

Respondent Allstate Indemnity Company is a wholly-owned subsidiary of Allstate Insurance Company, which is an Illinois insurance company. Allstate Insurance Company is a wholly-owned subsidiary of The Allstate Corporation, a Delaware corporation. The stock of The Allstate Corporation is publicly-traded. No publicly-held entity owns 10% or more of the stock of The Allstate Corporation.

Respondent Encompass Indemnity Company is a wholly-owned subsidiary of Allstate Insurance Company, an Illinois insurance company. Allstate Insurance Company is a wholly-owned subsidiary of The Allstate Corporation, a Delaware corporation. The stock of The Allstate Corporation is publicly-traded. No publicly-held entity owns 10% or more of the stock of The Allstate Corporation.

Respondent The American Insurance Company is a wholly-owned subsidiary of Fireman's Fund Insurance Company. Fireman's Fund Insurance Company, a California corporation, is a wholly-owned subsidiary of Allianz Global Risks US Insurance Company.

CORPORATE DISCLOSURE STATEMENT – Continued

Allianz Global Risks US Insurance Company is a wholly-owned subsidiary of Allianz of America, Inc., which is a wholly-owned subsidiary of Allianz Aktiengesellschaft (Allianz AG). Allianz AG is a publicly-held company that indirectly holds 10% or more of Fireman's Fund Insurance Company and its subsidiaries.

Respondent Great Northern Insurance Company is a wholly-owned subsidiary of Federal Insurance Company, which, in turn, is a wholly-owned subsidiary of The Chubb Corporation, a publicly-traded company on the New York Stock Exchange.

Respondent The Hanover Insurance Company is a wholly-owned subsidiary of Opus Investment Management, Inc., a wholly-owned subsidiary of The Hanover Insurance Group, Inc., a publicly-traded company of which Hotchkiss & Wiley owns more than 10% of the stock.

Respondent Lafayette Insurance Company is a subsidiary of the United Fire & Casualty Company, a foreign insurer domiciled in Iowa, which is publicly-traded on NASDAQ.

Respondent Lexington Insurance Company is 70% owned by National Union Fire Insurance Company of Pittsburgh, PA, 20% owned by The Insurance Company of the State of Pennsylvania, and 10% owned by AIG Casualty Company – formerly known

CORPORATE DISCLOSURE STATEMENT – Continued

as Birmingham Fire Insurance Company of Pennsylvania. National Union Fire Insurance Company of Pittsburgh, PA, The Insurance Company of the State of Pennsylvania, and AIG Casualty Company are each 100% owned by AIG Commercial Insurance Group, Inc. AIG Commercial Insurance Group, Inc. is 100% owned by AIG Property Casualty Group, Inc. AIG Property Casualty Group, Inc. is 100% owned by American International Group, Inc.; a publicly-traded corporation. No parent corporation or publicly-held corporation owns 10% or more of American International Group, Inc. stock.

Respondent Liberty Mutual Fire Insurance Company discloses as follows: Liberty Mutual Group owns 100% of the stock of Liberty Mutual Fire Insurance Company. LMHC Massachusetts Holdings Inc. owns 100% of the stock of Liberty Mutual Group Inc. Liberty Mutual Holding Company Inc. owns 100% of the stock of LMHC Massachusetts Holdings Inc. No publicly-traded entity owns any stock of any of the above-named entities.

Respondent Louisiana Citizens Property Insurance Corporation is the statutorily created entity charged with operating the residual property insurance plan for the State of Louisiana pursuant to La. Rev. Stat. § 22:1430 *et seq*.

CORPORATE DISCLOSURE STATEMENT – Continued

Respondent The Standard Fire Insurance Company is a wholly-owned subsidiary of Travelers Insurance Group Holdings Inc., which is a wholly-owned subsidiary of Travelers Property Casualty Corp., which is a wholly-owned subsidiary of The Travelers Companies, Inc., a publicl -traded company.

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BRIEF FOR RESPONDENTS IN OPPOSITION

The sole issue decided by the Fifth Circuit was the proper construction of an insurance policy provision under state insurance law. In reviewing the trial court's ruling on Rule 12 motions, the Fifth Circuit concluded unanimously that the massive inundation of New Orleans at the time of Hurricane Katrina was clearly a "flood" as that term is used in water damage exclusions in homeowners policies. *In re Katrina Canal Breaches Litig.*, 495 F.3d 191, 195-97, 206-21 (5th Cir. 2007), Appendix to Petition for Writ of Certiorari ("App.") 4-5, 29-66. The Fifth Circuit also denied Petitioners' request to certify this question to the Louisiana Supreme Court because there was adequate guidance in the principles of contract construction mandated by the Louisiana Civil Code, although there was no Louisiana precedent directly on point. The Fifth Circuit remanded to the district court for further proceedings because the district court had only ruled on the applicability of the "flood" exclusions and had not ruled on the remaining counts in the complaints. Following remand, the district court has stayed this case pending action by the Louisiana Supreme Court on writ applications in *Sher v. Lafayette Insurance Co.*, which involves, among other things, application of a local insurance carrier's flood exclusion that is similar to some of the Respondents' various flood exclusions here.

None of this Court's considerations for granting certiorari are present in this case. There is no circuit split or important federal question involved. And the

lower courts did not depart from the usual course of judicial proceedings in deciding this case. Petitioners do not even argue that this case involves any question of *national* importance, but contend only that the state law issue is of great *local* importance. Petition for Writ of Certiorari ("Pet.") at 11-12, 15. There is no issue warranting this Court's review.

STATEMENT OF THE CASE[1]

On August 29, 2005, Hurricane Katrina struck the City of New Orleans. After the storm passed through New Orleans, water began to inundate the City. New Orleans officials determined that breaches in levee walls caused water to accumulate in various areas of the City and adjoining parishes. In the aftermath of the storm, some 80% of Orleans Parish was "under water."

Petitioners are homeowners (and in one instance, a commercial property owner) who sustained water damage to their properties as a result of the flooding. Damage caused by "flood" is generally covered by flood insurance policies issued under the federally-subsidized National Flood Insurance Program, but is generally excluded by homeowners policies and many

[1] On this appeal from a ruling on Fed. R. Civ. P. 12 motions, the material factual allegations of Petitioners' complaint are taken as true. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 104 (1998).

commercial policies. Petitioners contend, however, that what occurred in New Orleans was not a "flood" because the term "flood" should be restricted to "natural" events. They allege that the inundation of New Orleans was caused by human acts or omissions in the design, construction and maintenance of the levees.

Petitioners filed this putative class action against several insurance companies, which was heard together with several parallel class and individual actions. All plaintiffs sought a declaration that their respective homeowners and commercial insurance policies cover water damage to their properties resulting from levee failures during Hurricane Katrina.

The insurers moved to dismiss, contending that the flood or water damage exclusions in the various insurance policies at issue bar coverage. Although the insurance policies at issue are not identical, all of the policies contain provisions excluding loss caused directly or indirectly by water or water damage, which is defined to include "flood."[2]

The district court ruled that the water damage exclusions in all of the insurance policies at issue in this case, except those issued by State Farm Fire & Casualty Company ("State Farm"), were ambiguous and therefore had to be construed against the

---

[2] Some of the precise language of the respective insurance policies at issue is set forth in the Fifth Circuit's opinion. *Katrina Canal Breaches*, 495 F.3d at 197-203, App. 8-24.

insurers. It dismissed the claims against State Farm and denied motions to dismiss by the other insurers, certifying that issue for appeal pursuant to 28 U.S.C. § 1292(b) (2006).

The Fifth Circuit concluded that "even if the plaintiffs can prove that the levees were negligently designed, constructed, or maintained and that the breaches were due to this negligence, the flood exclusions in the plaintiffs' policies unambiguously preclude their recovery." *Katrina Canal Breaches,* 495 F.3d at 196, App. 5. It rejected Petitioners' argument that the lack of a definition of "flood" rendered the term ambiguous. Absent a definition, a court must, under the Louisiana Civil Code, give the term "'its generally prevailing meaning.'"[3] *Id.* at 209-10, App. 36, 40 (citing and quoting LA. CIV. CODE ANN. art. 2047). The Fifth Circuit extensively examined how "flood" has been defined in dictionaries, treatises, and cases from both Louisiana and elsewhere. *Id.* at

---

[3] Louisiana is a unique civil law jurisdiction in which "the only authoritative 'sources of law are legislation and custom,'" and "courts must look first and foremost to the state's 'primary sources of law: the State's Constitution, codes, and statutes.'" *American Int'l Specialty Lines Ins. Co. v. Canal Indem. Co.*, 352 F.3d 254, 260 (5th Cir. 2003) (internal citations omitted). *See also In re Whitaker Constr. Co.*, 439 F.3d 212, 222 (5th Cir. 2006) ("In the civil law tradition, the Civil Code is the 'solemn expression of legislative will' to which our *Erie* obligation applies.") (internal citations omitted). The Fifth Circuit analyzed and applied the applicable provisions of the Louisiana Civil Code. *Katrina Canal Breaches*, 495 F.3d at 206-21, App. 29-66.

210-15, App. 41-49. In light of all of these definitions, it concluded that:

> the flood exclusions are unambiguous in the context of this case and that what occurred here fits squarely within the generally prevailing meaning of the term "flood." When a body of water overflows its normal boundaries and inundates an area of land that is normally dry, the event is a flood. . . .
>
> Additionally, a levee is a *flood*-control structure; its very purpose is to prevent the floodwaters of a watercourse from overflowing onto certain land areas, i.e., to prevent floods from becoming more widespread. By definition, whenever a levee ruptures and fails to hold back floodwaters, the result is a more widespread flood. That a levee's failure is due to its negligent design, construction, or maintenance does not change the character of the water escaping through the levee's breach; the waters are still floodwaters, and the result is a flood.

Id. at 214, App. 49-50 (emphasis in original, footnote and citations omitted).

The Fifth Circuit disagreed with Petitioners that, in the context here, the term "flood" could reasonably be read as limited to natural events. While Petitioners cited many dictionary definitions, "the dictionaries we have reviewed make no distinction between floods with natural causes and those with non-natural causes," and some specifically say that a flood may result from failure of a dam or levee. *Id.* at 215,

App. 51-52. Cases finding coverage for inundations resulting from burst water mains are distinguishable because the latter do not result from the overflow of a body of water and because the volume of water involved is not comparable to that which inundated New Orleans. *Id.* at 217-19, App. 56-57.

Petitioners argued that the term "flood" was part of a series with other terms: "surface water," "waves," "tidal water," and "overflow of a body of water." *Id.* at 218, App. 59. They contended that all of these terms referred only to events that occur naturally, and that "flood" should be read in light of that limitation. *Id.*, App. 59. The Fifth Circuit disagreed with the premise:

> For example, a "surface water" exclusion has been held to bar coverage where the inadequate design of a drainage system caused water to accumulate rather than drain away, resulting in water damage. And the term "waves" has been held to "encompass[ ] both those waves which are motivated by natural forces and those motivated by artificial forces" such as passing motorboats.

Id. at 218-19, App. 59-60 (internal citations omitted). Because "at least some of the terms immediately surrounding 'flood' in the water-damage exclusions also relate to both natural and non-natural events, the canon of *noscitur a sociis* does not support the plaintiffs' proposed limitation of the term 'flood.'" *Id.* at 219, App. 60. The Fifth Circuit also noted that a canon of construction cannot be used to inject

ambiguity into an otherwise unambiguous contractual provision. *Id.*, App. 60-61.

Accordingly, the Fifth Circuit concluded that the flood exclusions were unambiguous in the factual context here. *Id.*, App. 61. The Fifth Circuit therefore affirmed the dismissal of the complaints against State Farm, vacated the orders as to the other insurers and remanded for further proceedings. *Id.* at 224, App. 72-73. Petitioners moved to stay the mandate, contending that the Fifth Circuit's decision was in conflict with opinions by Louisiana state trial court judges, and noting that the Louisiana Fourth Circuit Court of Appeal was scheduled to hear oral argument in September of 2007 in *Sher v. Lafayette Insurance Co.*, a case involving the applicability of a flood exclusion. Petitioners asked the Fifth Circuit to await decisions by both the Louisiana Fourth Circuit Court of Appeal and Louisiana Supreme Court in *Sher* before issuing its mandate. Petitioners also filed petitions for rehearing en banc, in which they asked the en banc court to certify the question to the Louisiana Supreme Court. The Fifth Circuit denied the motion to stay the mandate and the en banc petition. App. 200-01.

SUMMARY OF ARGUMENT

This case concerns construction of insurance policies under state insurance law, a subject this Court properly leaves to the lower federal courts.

Petitioners make only one argument: that the Fifth Circuit should have certified the question presented to the state supreme court. But this Court has held that the decision whether to certify a question of state law to the appropriate state court rests in the sound discretion of the court asked to certify. There is no challenge to the criteria the Fifth Circuit looks to in making that discretionary decision. The Fifth Circuit acted well within its discretion in concluding that the Louisiana Civil Code and the state supreme court decisions on insurance policy interpretation provided ample basis for it to decide the question presented, but even if it made a mistake, it is not this Court's function to correct individual mistakes, particularly when the issues are ones of state law.

While Petitioners make much of the subsequent state intermediate appellate decision in *Sher*, there was no majority opinion in that case, nor did the plurality opinion favoring Petitioners' arguments offer any persuasive rebuttal to the Fifth Circuit's thorough analysis of the state insurance law issues here. This Court has never issued a GVR order because a state *intermediate* appellate court issued an opinion conflicting with a federal court of appeals decision, or because review was being sought in a state supreme court. There is certainly no reason to do so here based on a non-precedential, evenly-divided and sparsely reasoned opinion of one of Louisiana's five circuit courts of appeal. This is particularly true in a jurisdiction in which legislation is the primary source of law and appellate decisions,

even unanimous ones, are not binding until there is a line of authority strong enough to become *jurisprudence constante*.

REASONS FOR DENYING THE WRIT

I. THE ONLY SUBSTANTIVE ISSUE IN THIS CASE IS A QUESTION OF LOUISIANA INSURANCE LAW.

The fundamental issue presented is whether the Fifth Circuit correctly decided a Louisiana state law question of insurance policy construction. This is not a subject that warrants this Court's review.

This Court has consistently refused to grant certiorari to review a federal appellate court's interpretation of state law. This Court's "custom on questions of state law ordinarily is to defer to the interpretation of the Court of Appeals for the Circuit in which the State is located." *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 16 (2004). This is because "federal judges who deal regularly with questions of state law in their respective districts and circuits are in a better position than [the Supreme Court] to determine how local courts would dispose of comparable issues." *Butner v. United States*, 440 U.S. 48, 58 (1979). *See also McMillian v. Monroe County*, 520 U.S. 781, 786 (1997) ("Since the jurisdiction of the [Eleventh Circuit] Court of Appeals includes Alabama, we defer considerably to that court's expertise in interpreting Alabama law."); *Jett v. Dallas*

Indep. Sch. Dist., 491 U.S. 701, 738 (1989) ("We think the [Fifth Circuit] Court of Appeals, whose expertise in interpreting Texas law is greater than our own, is in a better position to determine [the state law issues in the case].").

Lower federal judges' familiarity with local law routinely leads this Court to refuse to review a federal court decision when – as here – the issue is an interpretation of state law. *See, e.g., Wharf (Holdings), Ltd. v. United Int'l Holdings, Inc.*, 532 U.S. 588, 596 (2001) ("Though Wharf disputes the correctness of [the Tenth Circuit's interpretation of the Colorado Statute of Frauds], we ordinarily will not consider such a state-law issue, and we decline to do so here."); *Butner*, 440 U.S. at 51 ("We did not grant certiorari to decide whether the Court of Appeals correctly applied North Carolina law.").

This Court should follow that same course here and refuse to review the Fifth Circuit's application of the Louisiana Civil Code to construe Petitioners' insurance policies.

II. THE FIFTH CIRCUIT DID NOT ABUSE ITS DISCRETION IN DECLINING TO CERTIFY THE QUESTION PRESENTED TO THE LOUISIANA SUPREME COURT.

There is no merit to Petitioners' suggestion that the Fifth Circuit abused its discretion in denying Petitioners' motions to certify the questions presented to the Louisiana Supreme Court. More than sixty

years ago, this Court settled the question of whether a federal court must have guidance from state courts when confronted with a question of state law not already precisely decided by the state courts:

> [I]t has from the first been deemed to be the duty of federal courts, if their jurisdiction is properly invoked, to decide questions of state law whenever necessary to the rendition of a judgment. . . . [D]enial of that opportunity by the federal courts merely because the answers to the questions of state law are difficult or uncertain or have not yet been given by the highest court of the state, would thwart the purpose of the jurisdictional act.

Meredith v. City of Winter Haven, 320 U.S. 228, 234-35 (1943) (internal citations omitted). Certification is not "obligatory" even if "there is doubt as to local law. . . ." *Lehman Bros. v. Schein*, 416 U.S. 386, 390-91 (1974). Rather, deciding whether to certify "in a given case rests in the sound discretion of the federal court." *Id.* at 391 (Rehnquist, J., concurring). "If a district court or court of appeals believes that it can resolve an issue of state law with available research materials already at hand, and makes the effort to do so, its determination should not be disturbed simply because the certification procedure existed but was not used[,]" and this Court will leave the question of whether certification is appropriate on the facts of a given case "to the sound judgment of the court making the initial choice." *Id.* at 395.

In accordance with this Court's precedent, the Fifth Circuit holds that the decision whether to certify a question to the state supreme court is discretionary, depending on consideration of many factors. *Patterson v. Mobil Oil Corp.*, 335 F.3d 476, 487 (5th Cir. 2003); *Florida ex rel. Shevin v. Exxon Corp.*, 526 F.2d 266, 274 (5th Cir. 1976). "The most important are the closeness of the question and the existence of sufficient sources of state law . . . to allow a principled rather than conjectural conclusion." *Id.* at 274-75. But the court also considers the "practical limitations of the certification process; significant delay and possible inability to frame the issue so as to produce a helpful response on the part of the state court." *Id.* Petitioners have never questioned these standards, either in their Petition or in the Fifth Circuit. They argue only that the Fifth Circuit made a mistake in this case by not certifying to the Louisiana Supreme Court.

The Fifth Circuit acted well within its discretion in denying certification. The Fifth Circuit routinely construes Louisiana insurance policies, without resorting to certification.[4] It did not need to resolve

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[4] *See Arias-Benn v. State Farm Fire & Cas. Ins. Co.*, 495 F.3d 228, 230 (5th Cir. 2007) (interpreting insurance policy under Louisiana law to determine coverage for spoiled refrigerators due to Katrina); *United Fire & Cas. Co. v. Hixson Bros. Inc.*, 453 F.3d 283, 284 (5th Cir. 2006) (interpreting insurance endorsement under Louisiana law); *Riverwood Intern. Corp. v. Employers Ins. of Wausau*, 420 F.3d 378 (5th Cir. 2005) (interpreting insurance contract under Louisiana law); *Cochran v.*

(Continued on following page)

conflicting appellate precedent in the state courts. It found ample guidance in well-established principles of insurance policy construction as set forth in the Louisiana Civil Code. *In re Katrina,* 495 F.3d at 206-08, 206 n.11, App. 29-35, 35 n.11.

Petitioners do not argue that the Fifth Circuit applied an incorrect standard in deciding whether to certify the issue, except to the extent that the Petition appears to suggest that a federal court is obliged to certify any uncertain question of state law. If that is what they contend, this Court has already rejected their contention in *Lehman Bros.*, 416 U.S. at 390-91; *see also* Section II, *supra* at 9.

Petitioners cite *Arizonans for Official English v. Arizona,* 520 U.S. 43, 76 (1997), as supporting the desirability of certification. Pet. 10-11. But the factor

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B.J. Services Co. USA, 302 F.3d 499 (5th Cir. 2002) (deciding insurance coverage issue under Louisiana law); *Seafirst Commercial Corp. v. U.S. Fid. & Guar. Co.*, 780 F.2d 1290 (5th Cir. 1986) (same). *See also Transamerica Ins. Co. v. Duro Bag Mfg. Co.*, 50 F.3d 370, 372 (6th Cir. 1995) (declining to certify because, although the state had not addressed the exact question, general principles regarding interpretation of insurance contracts gave sufficient guidance); *Woodbridge Place Apartments v. Wash. Square Capital, Inc.*, 965 F.2d 1429, 1434 (7th Cir. 1992) (although case presented "challenging questions of contractual interpretation," certification was not appropriate because general principles provided enough guidance); *West American Ins. Co. v. Bank of Isle of Wight*, 673 F. Supp. 760, 764-65 (E.D. Va. 1987) ("Discretionary certification is inappropriate where, as here, there is persuasive authority available from other jurisdictions on the unresolved, dispositive state issue.").

most strongly supporting certification there was that allowing the Arizona Supreme Court to construe the challenged state constitutional provision might well avoid the need to decide the federal constitutional questions presented. But this case presents no federal constitutional question to be avoided.

Petitioners also cite the *dissent* in *Town of Castle Rock v. Gonzales,* 545 U.S. 748, 777 (2005) (Stevens, J., dissenting). Pet. 11. But there, as in *Arizonans for Official English,* the proposed reason for certification was to determine whether it was necessary to decide a constitutional question. Moreover, the case actually reinforces the rule that certification is discretionary, because this Court chose to predict uncertain state law, rather than certifying the question to the state supreme court.

Petitioners complain of inconsistency in failure to certify the issue here, citing other cases in which the Fifth Circuit certified insurance coverage questions to state supreme courts. The short answer to this complaint is that the Fifth Circuit evidently found the state law guidance available in those cases less clear than it did here, and chose to exercise its discretion in a different manner. *One Beacon Ins. Co. v. Don's Bldg. Supply, Inc.*, 496 F.3d 361, 364 (5th Cir. 2007) (split of authority in Texas intermediate appellate courts); *Fiess v. State Farm Lloyds,* 392 F.3d 802 (5th Cir. 2004) (split of authority in Texas intermediate appellate courts); *Jesco Constr. Corp. v. NationsBank Corp.*, 278 F.3d 444, 448 (5th Cir. 2001) (split of authority in Louisiana intermediate appellate courts); *Frey v.*

Amoco Prod. Co., 951 F.2d 67 (5th Cir. 1992) (Fifth Circuit decided the question and then, on rehearing, certified). Even if the Fifth Circuit erred in doing so, it is not typically this Court's function to correct errors in individual cases, especially not where the ultimate issue is one of state law.

III. THE DECISION OF THE LOUISIANA COURT OF APPEAL IN *SHER V. LAFAYETTE INSURANCE CO.* DOES NOT WARRANT A GVR ORDER.

A great deal of the Petition is devoted to arguing that the Fifth Circuit's decision is contrary to the later decision of a Louisiana intermediate appellate court in *Sher v. Lafayette Insurance. Co.*, No. 2007-CA-0757, 2007 WL 4247708, at *1, (La. Ct. App. Nov. 19, 2007) (plurality opinion), App. 202-269, Pet. 7, 15-19.

But there was no majority opinion in that case. Of the five judges on the panel, two found the word "flood" ambiguous[5] and two found it unambiguous. One of the two judges who found the word "flood" unambiguous, however, concluded that the property damage at issue was caused by wind, not flood, and

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[5] Judges Love and McKay concluded that the insurance policy "is ambiguous as it relates to the water exclusion because it is unclear what types of floods are excluded." *Id.* at *5, App. 214.

was therefore covered.[6] The fifth judge voted to require the insurer to pay for the property damage that it contended was caused by flood, but she did not explain her vote, so it is impossible to know whether she found an ambiguity or found a different way to support the result.

Without a majority on whether the word "flood" is ambiguous, the *Sher* decision is of little precedential value in a Louisiana state court.[7] *See Chaney v. Travelers Ins. Co.*, 249 So. 2d 181, 184 (La. 1971) (concluding that a decision had no majority opinion "on the reasons for judgment, only on the results reached[ ]" because, of seven justices, one justice concurred in the result reached only, and three judges

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[6] Judge Tobias disagreed "with the majority's analysis of the law and the facts"; he did "not read the word 'flood' in the contract of insurance as ambiguous at all. Rather, it is clear that the word 'flood' applied to any and all floods." *Id.* at *20, App. 252. But he found it possible to take judicial notice of facts which, in his opinion, established that the disputed damage was caused by wind and rain, before the arrival of the flood waters. *Id.* at *21, App. 253-54.

Judge Cannizzaro likewise found "no merit in the majority's [*sic*] conclusion that the term 'flood' as utilized in the policy at hand is susceptible to different meanings, thereby rendering the water damage exclusion inapplicable." *Id.* at *23, App. 261. It was his "steadfast conclusion that the origin of the flood, whether man-made or otherwise is of no consequence due to the clarity and unambiguousness of the water damage exclusion." *Id.* at *24, App. 263.

[7] The *Sher* decision, even if it were binding precedent, does not address all of the various formulations of the flood or water exclusions at issue in *Katrina Canal Breaches*.

dissented). *See also Citizens Comm. for Better Law Enforcement v. City of Lafayette*, 685 So. 2d 289, 293 (La. Ct. App. 1996) (stating that the holding of an earlier plurality opinion relied upon by both parties "is of little value as precedent and should properly be limited to the facts of that case only." (internal citation omitted)).

Even if *Sher* were unanimous and directly contrary to the Fifth Circuit opinion, it would not be binding on the Fifth Circuit, which would be obliged to make its own prediction of what the Louisiana Supreme Court would rule. *See, e.g., Commissioner v. Estate of Bosch*, 387 U.S. 456, 465 (1967). This is especially true where the issue is one of Louisiana law, because Louisiana courts do not follow *stare decisis*. Appellate decisions are not binding until there is a line of authority sufficient to constitute *jurisprudence constante*. *See Chevron USA, Inc. v. Vermilion Parish Sch. Bd.*, 377 F.3d 459, 462 (5th Cir. 2004) ("[A]lthough we may be guided by decisions rendered by the Louisiana appellate courts, we are not strictly bound by them, particularly when the jurisprudence has not developed to the status of *jurisprudence constante* (a series of decisions in accord on a given issue)."); *Lake Charles Diesel, Inc. v. GMC*, 328 F.3d 192, 197 (5th Cir. 2003) (noting that, in Louisiana, "judicial decisions acquire the force of law only when their numerosity and uniformity are sufficient to achieve the status of *jurisprudence constante*.").

Moreover, the two-judge plurality opinion finding the *Sher* flood exclusion ambiguous is not persuasive. It does not address, or even acknowledge, the extensive, careful, and detailed analysis by the Fifth Circuit. The opinion simply asserts, without any support, that "'flood' is susceptible to different meanings due to the varying causes of floods," requiring selection of a meaning that conforms to the object of the contract. *Sher*, 2007 WL 4247708, at *4, App. 212-213. On this basis, the plurality opinion reasons as follows:

> A review of the Policy reveals that the parties intended to cover and include all risks that were not specifically excluded or limited. Lafayette failed to specifically exclude all floods because of the ambiguity contained within the water exclusion. While the Policy states that it does not cover damage caused by a "flood," it also states that it does not cover "waves, tides, tidal waves," and the "overflow of any body of water . . . whether driven by wind or not." This exclusion includes "flood," but then continues to list specific natural disasters that cause inundations of water, commonly labeled as "floods." For example, a varying cause of flood can be man-made or natural, as documented in La. R.S. 29:762, which states that a flood is a natural disaster.[4]
>
> [4] La. R.S. 29:762 Definitions reads in pertinent part:

> (12)(a)(iii) A disaster, including but not limited to natural disasters such as hurricane, tornado, storm, flood, . . .

Id. at 4-5, 5 n.4, App. 213, 213 n.4.

This is the plurality's entire analysis of the supposed ambiguity. That opinion contains no analysis of common usage or dictionary definitions, no consideration of the natural character of the flood (even though the levees had failed to contain the flood), and no examination of caselaw. The opinion simply asserts, without support, that the other specifically excluded events involve only natural causes (an assertion the Fifth Circuit had shown to be false). (*See* discussion, *supra*, at 3-6.) So, even if this opinion were unanimous, it would provide no compelling reason for the Fifth Circuit to alter its prediction as to the likely decision of the Louisiana Supreme Court.

Thus, *Sher* cannot constitute an "intervening development[] . . . that [this Court might have] reason to believe the [Fifth Circuit] did not fully consider, [and which would] reveal a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration." *Lawrence v. Charter*, 516 U.S. 163, 167 (1996) (*per curiam*). Because that standard is not met, there is no occasion for this Court even to consider granting certiorari, vacating, and remanding for further consideration in light of *Sher*, even if such a GVR could possibly be

appropriate with respect to a decision of a lower state court.

CONCLUSION

The petition for a writ of certiorari should be denied.

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